

**Transit Management of Southeast Louisiana, Inc. and  
Dian M. Silva.** Case 15–CA–14577

May 25, 2000

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND  
BRAME

On October 22, 1999, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief.<sup>1</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs,<sup>2</sup> and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

*Tracie J. Jackson, Esq.*, for the General Counsel.

*Thomas M. Flanagan, Esq.*, of New Orleans, Louisiana, for the Respondent-Employer.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on June 8, 1999, in New Orleans, Louisiana, pursuant to a complaint and notice of hearing (the complaint) issued by the Regional Director for Region 15 of the National Labor Relations Board (the Board) on September 25, 1998. The complaint, based on an original charge filed on December 9, 1997,<sup>1</sup> and an amended charge filed on September

<sup>1</sup> The Board's Rules and Regulations Sec. 102.46(h) provides that, after reply briefs have been filed, no further briefs shall be filed except by special leave of the Board. In the absence of a request for special leave to file additional briefs, we reject the Respondent's January 25, 2000, submission, and the Charging Party's February 1, 2000, submission.

<sup>2</sup> In her exceptions, the Charging Party contends essentially that the General Counsel failed to introduce evidence establishing that the Respondent's buses were operationally unsafe for driving. In support, the Charging Party submitted what she claims to be U.S. Department of Transportation documents regarding Respondent's operation and the safety record of its vehicles. However, these documents were not made part of the record during the hearing and, therefore, are not properly before us. Even if we were to construe the Charging Party's exceptions as a motion to reopen the record, we would deny the motion on the ground that the Charging Party has failed to show that the documents in question are newly discovered and previously unavailable and that they would require a different result. See *Novel Knit, Inc.*, 299 NLRB 58 fn. 2 (1990); Sec. 102.48(d)(1) of the Board's Rules and Regulations.

The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing those findings.

<sup>1</sup> All dates are in 1997 unless otherwise indicated.

25, 1998, by Dian M. Silva (the Charging Party or Silva), alleges that Transit Management of Southeast Louisiana, Inc. (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act when it discharged Silva because she engaged in concerted activities with other employees for mutual aid and protection by making safety complaints at various times including Respondent's Board of Commissioners' meetings held on September 30 and October 28.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the provision of management services for the Regional Transit Authority of New Orleans, with an office and place of business located in New Orleans, Louisiana, where it annually purchased and received goods valued in excess of \$50,000 directly from points outside the State of Louisiana. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent manages the bus transportation system for the city of New Orleans. Silva commenced employment as a bus operator with the Respondent in October 1993 and was terminated on November 20. She is represented for collective-bargaining purposes by the Amalgamated Transit Union Local Division 1560 (the Union).

During the period between November 1996 and November 20, Silva filed approximately 128 written vehicle condition and employee incident reports,<sup>2</sup> complaining about safety related matters impacting on the operation of Respondent's bus fleet. Approximately 77 of the reports involved bad brakes while 17 involved writeups on safety equipment. As part of the Respondent's normal preventive maintenance procedure, each report is checked to verify if the vehicle requires maintenance or adjustment.

On September 30 Silva and seven bus operators attended the regularly scheduled Board of Commissioners' meeting. A number of these employees, including Silva, publicly complained about the safety conditions of the buses and demanded that the fleet of buses should be inspected on a more regular basis. At the suggestion of the chairman of the board, an impromptu meeting was held between high level Respondent officials and the employees to further discuss the complaints raised during the Commissioners' meeting. Additionally, the superintendent of transportation gave Silva his business telephone number to contact him directly with any problems involving the bus fleet. After the meeting, Respondent conducted

<sup>2</sup> A vehicle condition report is provided to the operator on every bus run. In case there is a maintenance problem of any kind, the operator is instructed to fill out the report. An employee incident report is used to alert Respondent about specific problems concerning the bus.

safety tests on every bus to address the issues raised by the employees. No major problems were uncovered.

On October 1 an article was published in the Times-Picayune newspaper that reported on the events of the September 30 Commissioners' meeting, and noted that Silva raised the contention that brakes on many buses are faulty and that tight scheduling forces operators to drive too fast.

On October 28 Silva again spoke at the next scheduled Commissioners' meeting about safety related issues. Respondent's high level officials also attended this meeting.

The Union filed a grievance over Silva's termination. The parties met on November 24, December 3 and 16, and January 8, 1998, to discuss the discharge. During each of the above noted meetings, the Respondent provided an opportunity for Silva to be reinstated with certain conditions attached such as enrolling in and completing the employee assistance program and taking a physical examination (R. Exhs. 1-4). Silva and the Union rejected the four individual offers of reinstatement.

At all material times LeRoy Bailey served as general manager of Respondent, Mac Brown is the superintendent of the Canal Station, and Roy Montague and Ron Duhe held the positions of supervisors.

### B. Facts

On November 20 Silva reported for work around 7:14 a.m. and began checking her assigned bus before departing the facility. After checking the tires, Silva informed the tire repairman Johnnie Williams that the right rear inside tire was flat and asked him to check it. Williams checked the right rear tire and found nothing wrong with it. Silva became upset and told Williams, "you don't have to do anything to the dam bus." Williams replied, "that Silva should take the bus to the tire shop and he would check it a little more." Silva refused to drive the bus to the tire shop and said, "you fucking people don't know anything." Williams went to Silva's supervisor and asked him to talk with her. Williams then took the bus to the tire shop and when Silva appeared in the shop, he told her she was not permitted to be in the work area. Maintenance shop supervisor Duhe, who was informed of a commotion in the tire shop by another employee, proceeded to that area and overheard Williams tell Silva that she was not permitted in the tire shop work area. Duhe also heard Silva state to Williams, "stop fucking me around." Upon arriving at the tire shop, Duhe independently informed Silva that she was not permitted to remain in the work area. Duhe testified that Silva stated before leaving the tire shop that, "she can just about do any fucking thing [sic] she wanted to on RTA's property." After Silva left the tire shop, Williams put the bus up on the lift and again inspected the right rear inside tire. He found no problems with the tire. Likewise, Duhe also inspected the tires and found them to be inflated properly. Shortly after the incident, Duhe reported the matter to Brown.

Supervisor Montague called Brown on the radio to inform him of the problem. It was decided that since Silva had not left the facility and was now approximately 25 minutes late for her run, to provide her with another bus. Silva departed the facility and completed her run. Upon arriving at the facility, Brown instructed Williams and Montague to provide written statements about the incident with Silva. Brown further instructed Montague that immediately upon Silva's return from her route, she was to attend a meeting in his office.

Silva reported to Brown's office around 9 a.m., and Brown asked her what happened? Silva stated that, "the company was

setting her up by assigning her a bus with a flat tire."<sup>3</sup> Brown replied, "that was not true and the company does not set up anyone." Silva then said, "the mother-fucking company is doing nothing but setting up drivers." Brown told Silva not to use that type of language in his office.

Brown then read the statements of tire repairman Williams and Montague and asked Silva if she cursed Williams (GC Exhs. 3 and 6). Silva denied that she used profanity towards either individual. Brown then read the respondent's disciplinary guide, rule #3, that provides that cursing other employees is subject to termination. Silva then said, "Fire me, so I can sue this dam company."

Brown informed Silva that she was being terminated for violation of this rule and was given a copy of the personnel entry report confirming the termination (GC Exh. 5).

### Analysis

The General Counsel alleges in paragraphs 7 and 8 of the complaint that Silva was terminated on November 20 because she raised numerous safety complaints including those made at Respondent's Board of Commissioners' meetings held on September 30 and October 28.

Respondent contends that Silva's termination was unrelated to her numerous safety complaints. Rather, the Respondent argues that Silva was terminated for her abusive language uttered on November 20 directed at both supervisors and individual employees.

The Board has held that Section 7 protects "concerted activities for the purpose of collective bargaining or other mutual aid or protection." No union need be involved, any activity by a single employee may be protected if it seeks to initiate, induce or prepare for group action. *Prill v. NLRB (Meyers Industries)*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). This protection specifically includes discussions about safety related issues between two or more employees. *Systems with Reliability, Inc.*, 322 NLRB 757 (1996).

There is no dispute that Silva engaged in concerted activities with other employees for mutual aid and protection by making numerous safety complaints at various times including attending and speaking at two of Respondent's board of commissioners' meetings. Indeed, the parties stipulated to this fact at the hearing. Additionally, Brown candidly admitted that he was aware that Silva filed numerous vehicle condition and employee incident reports raising safety related issues, and that he individually met with Silva on a number of occasions to review her complaints.

Based on my review of the testimony and the evaluation of all of the witnesses' testimony, I am not convinced that Silva was terminated because of her numerous complaints about safety issues. Rather, I conclude that Silva was terminated because she violated disciplinary guide, rule #3, that prohibits cursing of other employees and can be grounds for termination. I reach this conclusion for the following reasons.

First, the record contains the written statements of employee Williams and Supervisor Montague that were memorialized on the day of the confrontation with Silva. Both individuals state that Silva was upset and used profanity when discussing issues surrounding the tire incident. Second, Duhe credibly testified that he has known Silva for a number of years and she was not

<sup>3</sup> The record discloses that Alton Irvin, the lot dispatcher, randomly assigns buses to all drivers including Silva based on time of departure and position of the bus on the lot.

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acting herself on that day. Silva also acknowledged that she was terribly upset that day, crying on her bus route and also in Brown's office. Third, Brown impressed me as a sincere and objective witness who was upset at Silva's behavior with the tireman and Montague, but was pushed over the edge when Silva used profanity in his office and asked him to fire her so she could sue the "damn" company. Brown's recitation of the events is consistent with the statements of the two other employees and his own statement made on the day the incident took place (GC Exh. 4). Fourth, during the period between November 1996 and November 20 when Silva filed approximately 128 safety complaints, the Respondent looked into each allegation and took no disciplinary action against Silva. This sound and prudent business approach is consistent with the Respondent's conciliatory efforts to offer Silva the opportunity to be reinstated on four occasions, all of which were rejected. Fifth, Silva testified that seven other employees spoke publicly at the September 30 commissioners' meeting, and none of these employees were disciplined for making safety complaints. Moreover, Respondent's general manager, Leroy Bailey, and director of maintenance, Fred Basha, immediately convened an impromptu meeting of the employees to address their safety complaints, and director of transportation Joe Dorsey, gave Silva his business telephone number so she could contact him directly if she had any further complaints. This shows a commitment by Respondent to take safety seriously and address complaints initiated by employees. Moreover, Basha credibly testified that immediately after the meeting with Silva and the other employees on September 30, he contacted his superintendents for the locations where the vehicles are housed and each bus was checked before it went back on the street.

The General Counsel introduced two exhibits showing discipline visited on two other employees for violation of disciplinary guide, rule #3, that resulted in a lesser penalty than termination (GC Exhs. 7 and 8). In both instances, the confrontation and language took

place between two employees and was not directed towards a supervisor. In regard to one of the employees involved in the incident, unlike Silva, an apology was made acknowledging the conduct was inappropriate. Lastly, Brown credibly testified that on two other occasions, he terminated employees under disciplinary guide, item #3, for cursing a supervisor.

Under these circumstances, I reject the General Counsel's attempt to establish disparate treatment when considering the discipline visited upon other employees for violating disciplinary guide, item #3.

For all of the above reasons, including my evaluation of Silva's credibility and her reluctance to respond to questions in a sincere and forthright manner, I conclude that Silva was not terminated because she made complaints about safety related matters. Accordingly, I find that the Respondent did not violate Section 8(a)(1) of the Act.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent did not violate Section 8(a)(1) of the Act when it terminated employee Dian Silva on November 20, 1997.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

## ORDER

The complaint is dismissed.

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<sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.